**MAZLAN OTHMAN**

**v.**

**PP**

COURT OF APPEAL, PUTRAJAYA
ABDUL MALIK ISHAK JCA
CLEMENT SKINNER JCA
AZIAH ALI JCA
[CRIMINAL APPEAL NO: N-05-274-2010]
3 DECEMBER 2012

***CRIMINAL PROCEDURE:*** *Charge - Error in charge - Name of co-accused not stated in charge - Co-accused deceased at time of trial - Identity of co-accused known to accused - Whether accused misled by error or omission to state name of co-accused in charge - Criminal Procedure Code, s. 156*

***CRIMINAL PROCEDURE:*** *Defence - Alibi - Whether notice of alibi mandatory - Whether court has discretion to waive mandatory notice requirement - Whether court may exclude evidence pertaining to alibi defence where no notice given - Criminal Procedure Code, s. 402A*

***CRIMINAL PROCEDURE:*** *Defence - Conduct of defence - Incompetence of counsel - Whether counsel flagrantly incompetent in conducting defence - Whether accused convicted due to incompetence of counsel*

***EVIDENCE:*** *Circumstantial evidence - Nature of - Whether circumstantial evidence proved beyond reasonable doubt*

***EVIDENCE:*** *Presumption - Possession of stolen property - Accused to account for stolen goods in his possession - Evidence Act 1950, s. 114(a)*

The appellant was convicted in the High Court on two charges. The first charge was for discharging a firearm during the commission of a robbery, contrary to s. 3 of the Firearms (Increased Penalties) Act 1971. The second charge was for using a deadly weapon (a firearm) and causing grievous hurt to another whilst committing a robbery, contrary to s. 392 read with s. 397 and s. 34 of the Penal Code. In respect of the second charge, the appellant was charged with another person who had died before the trial. The appellant was sentenced to death on the first charge and to five years' imprisonment and two strokes of the cane on the second charge. He appealed to the Court of Appeal against the conviction and sentence.

**Held (dismissing the appeal)**
**Per Abdul Malik Ishak JCA delivering the judgment of the court:**

**(1)** In the instant appeal, the strands of circumstantial evidence connecting the appellant to the two charges constituted proof beyond reasonable doubt. Where the prosecution relies on circumstantial evidence, the correct test for the judge to follow would be the advice of Suffian LP in *Jayaraman & Ors v. PP* (FC). In the absence of direct and positive testimony of eye-witnesses, the court may infer from the facts proved, other facts necessary to prove the element of guilt. Circumstantial evidence is evidence of surrounding circumstances which, by undesigned coincidence, is capable of proving the guilt of an accused person with mathematical accuracy. In the instant case, the JC was sure that the facts proved were not only consistent with guilt but also consistent with any other reasonable conclusion in the context of circumstantial evidence. *Jayaraman & Ors v. Public Prosecutor* (FC) (foll); *Percival Leonard Taylor, James Weaver v. George Thomas Donovan* (refd). (paras 46-52)

**(2)** The evidence established a *prima facie* case against the appellant on both the charges. The JC had scrutinised, on a maximum evaluation basis, the evidence at the close of the prosecution's case. (paras 62 & 63)

**(3)** Although it was argued that the name of the deceased person involved in the second charge ought to have been incorporated in the charge, the appellant knew about the existence of the deceased person and was not prejudiced. Pursuant to s. 156 of the Criminal Procedure Code ('CPC'), the appellant was not misled by the error or omission. Further, this ground of appeal was not incorporated in the petition of appeal. (para 71)

**(4)** The appellant's defence was one of an alibi caught under s. 402A of the CPC. The pre-requirement of a pre-trial notice of an alibi defence under s. 402A of the CPC is mandatory. The courts have no discretion whatsoever to waive such a mandatory requirement. Since the evidence of the appellant hinged on alibi defence where no written notice under s. 402A of the CPC had been given to the Public Prosecutor, the JC

was right to exclude that part of the evidence pertaining to the alibi defence from his consideration of the appellant's defence. (paras 86-95)

**(5)** Though there were shortcomings that arose in the appeal, they were insignificant and could not exculpate the appellant. The shortcomings paled in comparison to the overwhelming circumstantial evidence which pointed to the guilt of the appellant. (paras 103 & 104)

**(6)** Pursuant to illustration (a) to s. 114 of the Evidence Act 1950, the court could presume that the appellant was in possession of the eight gold chains found in the front right pocket of the appellant's trousers soon after the robbery. The appellant had to account for those gold chains under s. 114(a) of the Evidence Act 1950. (paras 104 & 106)

**(7)** In the instant case, there was no flagrant incompetence on the part of the defence counsel who conducted the defence before the JC. The JC convicted the appellant not because of the incompetence of the defence counsel but because of the overwhelming circumstantial evidence adduced by the prosecution. On the facts, it would be a gross miscarriage of justice not to convict the appellant for committing the offences as per the charges. The appellant had failed to raise any reasonable doubt as to his guilt. (paras 115-118)

***Bahasa Malaysia*** *Translation Of Headnotes*

Perayu telah disabitkan di Mahkamah Tinggi atas dua pertuduhan. Pertuduhan pertama adalah kerana menggunakan senjata api semasa melakukan rompakan, suatu kesalahan di bawah s. 3 Akta Senjata (Penalti Lebih Berat) 1971. Pertuduhan kedua adalah kerana menggunakan senjata berbahaya (senjata api) dan menyebabkan cedera parah kepada seorang lain semasa melakukan rompakan, yang merupakan kesalahan di bawah s. 392 dibaca bersama s. 397 dan s. 34 Kanun Keseksaan. Berhubung pertuduhan kedua, perayu dituduh dengan seorang yang lain yang meninggal dunia sebelum perbicaraan bermula. Perayu dihukum mati bagi pertuduhan pertama dan lima tahun penjara dan dua sebatan rotan bagi pertuduhan kedua. Ini adalah rayuan perayu ke Mahkamah Rayuan terhadap sabitan dan hukuman.

**Diputuskan (menolak rayuan)**
**Oleh Abdul Malik Ishak HMR menyampaikan penghakiman mahkamah:**

**(1)** Di rayuan semasa, rangkaian keterangan ikut keadaan yang mengaitkan perayu dengan kedua-dua pertuduhan telah membentuk bukti di luar keraguan munasabah. Di mana pendakwaan bergantung kepada keterangan ikut keadaan, ujian yang betul untuk diikuti oleh hakim adalah pandangan yang diberikan oleh Suffian KHN di dalam *Jayaraman & Ors v. PP*. Dalam ketiadaan keterangan terus saksi-saksi mata, mahkamah boleh membuat andaian, dari fakta-fakta terbukti, fakta-fakta lain yang diperlukan untuk membuktikan elemen kebersalahan. Keterangan ikut keadaan adalah keterangan dari hal keadaan sekeliling yang, melalui keterbetulan tidak dirancang, berupaya membuktikan kebersalahan seseorang tertuduh dengan ketepatan matematik. Dalam kes semasa, PK tidak ragu-ragu bahawa fakta-fakta terbukti bukan sahaja konsisten dengan kebersalahan tetapi konsisten juga dengan segala konklusi munasabah dalam konteks keterangan ikut keadaan. *Jayaraman & Ors v. PP* (diikuti); *Percival Leonard Taylor, James Weaver v. George Thomas Donovan* (dirujuk).

**(2)** Keterangan telah membuktikan kes *prima facie* terhadap perayu atas kedua-dua pertuduhan. PK telah pun meneliti keterangan-keterangan di akhir kes pendakwaan dengan berdasarkan penilaian maksima.

**(3)** Walaupun dihujahkan bahawa nama orang yang mati yang terlibat dalam pertuduhan kedua sepatutnya dimasukkan ke dalam pertuduhan tersebut, perayu tahu mengenai kewujudan orang yang mati berkenaan dan tidak terprejudis. Berasaskan s. 156 Kanun Tatacara Jenayah ('KTJ'), perayu tidak terjejas oleh kekhilafan atau ketinggalan ini. Apapun, alasan rayuan ini tidak dinyatakan dalam petisyen rayuan.

**(4)** Pembelaan perayu adalah dalam bentuk alibi seperti diperuntukkan di bawah s. 402A KTJ. Syarat duluan mengenai notis alibi sebelum perbicaraan di bawah s. 402A KTJ adalah mandatori, dan mahkamah langsung tiada budi bicara untuk mengecualikan syarat wajib tersebut. Oleh kerana keterangan perayu bersandarkan kepada pembelaan alibi di mana tiada notis bertulis di bawah s. 402A KTJ telah diberi kepada

Pendakwa Raya, PK betul bila mana mengenepikan bahagian keterangan yang berkaitan dengan pembelaan alibi dari pertimbangannya apabila menimbang pembelaan perayu.

**(5)** Walaupun terdapat kelemahan yang berbangkit dalam rayuan ini, ia tidak penting dan tidak boleh melepaskan perayu. Kelemahan-kelemahan tersebut terlalu kecil jika dibandingkan dengan kelimpahan keterangan ikut keadaan yang menunjuk kepada kebersalahan perayu.

**(6)** Berdasarkan huraian (a) s. 114 Akta Keterangan 1950, mahkamah boleh mengandaikan bahawa perayu mempunyai milikan lapan rantai emas yang ditemui dalam poket kanan depan seluarnya sejurus selepas rompakan. Perayu bertanggungjawab untuk menjelaskan mengenai rantai emas tersebut di bawah s. 114(a) Akta Keterangan 1950.

**(7)** Dalam kes semasa, tidak wujud ketakkompetenan ketara di pihak peguambela yang mengendalikan pembelaan di hadapan PK. PK mensabitkan perayu bukan kerana ketakkompetenan peguambela tetapi kerana kekukuhan keterangan ikut keadaan yang dikemukakan oleh pendakwaan. Di atas fakta, tidak mensabitkan perayu kerana melakukan kesalahan-kesalahan seperti pertuduhan bererti melakukan satu salah bawa keadilan yang berat. Perayu gagal membangkitkan sebarang keraguan munasabah berkaitan kebersalahannya.

**Case(s) referred to:**

*Andy Bagindah v. PP [2000] 3 CLJ 289 CA* ***(refd)***
*Bakshish Singh v. The State of Punjab AIR 1971 2016* ***(refd)***
*Balachandran v. PP [2005] 1 CLJ 85 FC* ***(foll)***
*Director of Public Prosecutions v. Kilbourne [1973] AC 729 HL* ***(refd)***
*Hussin Sillit v. PP [1988] 2 CLJ 9; [1988] 1 CLJ (Rep) 128 SC* ***(refd)***
*Jayaraman Velayuthan & Ors v. PP [1982] CLJ 464; [1982] CLJ (Rep) 130 FC* ***(foll)***
*Law Tim Wah v. PP [1977] 1 LNS 51 FC* ***(refd)***
*Lejzor Teper v. The Queen [1952] AC 480 HL* ***(refd)***
*Looi Kow Chai & Anor v. PP [2003] 1 CLJ 734 CA* ***(foll)***
*Low Soo Song v. PP [2008] 1 CLJ 433 CA* ***(refd)***
*Low Soo Song v. PP [2009] 3 CLJ 309 FC* ***(refd)***
*McGreevy v. Director of Public Prosecutions [1973] 1 WLR 276 HL* ***(refd)***
*Mirza Murtala v. PP [2010] 4 CLJ 150 CA* ***(refd)***
*Percival Leonard Tatlor, James Weaver v. George Thomas Donovan [1928] 21 Cr App R 20 CCA* ***(refd)***
*PP v. Lam Peng Hoa & Anor [1996] 3 CLJ 747 HC* ***(refd)***
*PP v. Leong Heo Cheong [1990] 2 CLJ 818; [1990] 2 CLJ (Rep) 738 HC* ***(foll)***

A *PP v. Lim Chen Len [1981] 1 LNS 11 ACRJ FC* ***(refd)***
*PP v. Phon Nam [1989] 1 CLJ 7; [1989]1 CLJ (Rep) 142 SC* ***(refd)***
*PP v. Subramaniam [1968] 1 LNS 112 HC* ***(refd)***
*R v. Pointon [1985] 1 NZLR 109, 114 CA* ***(refd)***
*Ramli Kechik v. PP [1986] 1 CLJ 308; [1986] CLJ (Rep) 243, SC* ***(refd)***
B *Rangapula Ramasamy & Anor v. PP [1981] CLJ 129; [1981] CLJ (Rep) 261 HC* ***(refd)***
*Shamim Reza Abdul Samad v. PP [2009] 6 CLJ 93 FC* ***(foll)***
*Sheo Swarup and Others v. King Emperor AIR 1934 227* ***(refd)***
*Teng Howe Sing v. PP [2008] 5 CLJ 186 CA* ***(refd)***
*Vasan Singh v. PP [1989] 2 CLJ 402; [1989] 1 CLJ (Rep) 166 SC* ***(refd)***
C *Yong Kar Mun v. PP [2011] 1 LNS 1750* ***(refd)***

**Legislation referred to:**
Criminal Procedure Code, ss. 112, 156, 180(1), 399(1)(b), 402A, 425
Evidence Act 1950, ss. 30, 114(a)
Firearms (Increased Penalties) Act 1971, s. 3
D Penal Code, ss. 34, 392, 397

*For the appellant - Manjeet Singh Dhillon (Wan Mohd Fadzil Maamor with him); M/s Fadzil & Eddin*
*For the respondent - Mohamad Abazafree Mohd Abbas; DPP*

E *[Appeal from High Court, Seremban; Criminal Trials No: 45-8-2008 & 45(A)-9-2009]*

*Reported by Andrew Christopher Simon*

F

## JUDGMENT

**Abdul Malik Ishak JCA:**

**Introduction**

G

**[1]** Mazlan bin Othman – the appellant herein, faced two charges. The first charge was under s. 3 of the Firearms (Increased Penalties) Act 1971 and that first charge was worded as follows:

H

> Bahawa kamu pada 9.10.2007 lebih kurang jam 3.15 petang di kedai emas Banbau, No. 29, Jalan Dato' Undang Johol dalam Daerah Kuala Pilah di dalam negeri, Negeri Sembilan Darul Khusus telah melakukan sesuatu kesalahan berjadual iaitu rompakan dan pada masa melakukan rompakan telah melepaskan
I tembakan dari senjata api jenis Styer No. 03096 dengan niat hendak menyebabkan kecederaan kepada Chin Yuen Choon (KP. No: 830120-05-5229) yang demikian kamu telah melakukan

satu kesalahan di bawah Seksyen 3 Akta Senjata Api (Penalti Lebih Berat) 1971 dan boleh dihukum di bawah seksyen yang sama.

**[2]** The second charge against the appellant was for an offence under s. 392 of the Penal Code read with s. 397 of the same Code and read with s. 34 of the the same Code. Under the second charge, the appellant was charged with someone else who has since died and evidence was led to show that his name was Zulkifli bin Ali and the second charge was worded as follows:

Bahawa kamu bersama-sama dengan seorang yang telah meninggal dunia pada 9.10.2007 lebih kurang jam 3.15 petang di kedai emas Banbau, No. 29, Jalan Dato' Undang Johol dalam Daerah Kuala Pilah di dalam negeri, Negeri Sembilan Darul Khusus dengan niat bersama telah melakukan rompakan dan pada ketika melakukan perbuatan merompak tersebut, kamu telah menggunakan senjata berbahaya iaitu sepucuk pistol telah menyebabkan kecederaan serius kepada Chin Yuen Choon. Oleh yang demikian kamu telah melakukan satu kesalahan (di bawah) Seksyen 392 Kanun Keseksaan dibaca bersama-sama dengan Seksyen 397 Kanun Keseksaan seterusnya dibaca dengan Seksyen 34 Kanun Keseksaan.

**[3]** After a full trial before the learned Judicial Commissioner ("JC") of the High Court, the appellant was found guilty for both charges and he was convicted and sentenced to death for the first charge and five (5) years' imprisonment and two (2) strokes of the cane for the second charge.

**[4]** Aggrieved, the appellant now appeals to this court.

## The Facts Of The Case

**[5]** The narration of the facts of the case will be based on the evidence adduced by the prosecution. On 9 October 2007 at 3.15pm while Chin Fei Fun (SP7) was standing in front of the showcase of the goldsmith's shop known as Kedai Emas Banbau at Kuala Pilah owned by his younger sibling by the name of Chin Yuen Choon (SP10), SP7 saw a motorcycle ridden by two male persons stopped in front of the said shop. SP7 saw that the two male persons wore face masks, black jackets and crash helmets and alighted from the motorcycle and entered the said shop. SP7 described the two male persons vividly in this way. One was small sized and thin and the other was big sized and slightly taller. One of them carried a hammer.

**[6]** Suspecting that these two male persons were planning to rob the goldsmith's shop, SP7 became frightened and he quickly ran inside the office of the said shop more towards the rear portion and at the same time shouting to his parents that "ada orang hendak rompak". On hearing SP7's shouts, both his parents, namely, Chin Kau @ Chin Hon Kaw (father – SP8) and Lim Hong Choon (mother – SP9) and SP10 who were all in the said shop saw two male persons wearing face masks, black jackets, jeans and crash helmets and one was taller than the other were inside the said shop and were committing robbery. They described that the shorter individual was holding a hammer.

**[7]** SP10 got out of the office and intended to take the fire extinguisher in order to spray at the two robbers. At that time, one of the male robbers aimed a pistol at SP10. Without warning, that male robber fired a shot from the pistol and that shot landed on the left shoulder of SP10. SP10 fell onto the floor. At the same time, the shorter male robber used a hammer and smashed the glass showcase of the goldsmith's shop. The robbers then scooped the jewelleries from the showcase and put them inside the pockets of their jeans. They then fled using a motorcycle.

**[8]** SP8 contacted the police and sent SP10 to the hospital. The medical report of SP10 can be seen in exh. "P9" and it showed that SP10 was shot on his left shoulder and the bullet was removed on 10 October 2007. Exhibit "P9" was worded as follows (see pp. 44 to 45 of the appeal record at Jilid 2):

| | |
|---|---|
| Name of patient | : CHIN YUEN CHOON |
| I/C No | : (New): 830120-05-5229 |
| MRN | : 621689 |
| Age | : 24 Y/O Sex: MALE |
| Date of admission of receiving treatment for the first time | : 09/10/2007 |
| Place where patient received treatment | : Emergency Department<br>Specialist Clinic<br>Ward: 3A |
| Date of discharge | : 12/10/2007 |

| | | |
|---|---|---|
| Discipline | : GENERAL SURGERY | A |
| History | : The patient was shot with a gun, over the left shoulder at 3.00 pm and presented with symptom of pain. | |
| Physical Examination | : There was an entry wound over the left (anterior) shoulder measuring 2x2cm and exit wound over the posterior shoulder 1x1cm. | B |
| Summary of investigations | : Chest X-ray – foreign body at 9th intercostal space<br>CT Abdomen/Thorax - contusion over left lung | C |
| Final Diagnosis | : Alleged gunshot wound over the left shoulder region. | D |
| Treatment | : Exploration of the wound and removal of bullet done on 10/10/2007. | |
| Drugs and other medicaments prescribed to patient | : IV Unasyn 1.5g tds<br>IV Tramal 50mg tds | E |
| Progress of patient while under the care of the doctor including follow up | : TCA in 3/12 to SOPD | F |

**[9]** In due course, SP9 and SP10 identified the jewelleries P13, P15, P16, P17, P18, P19, P20 and P21 ("A" to "J") that were robbed from the showcase of their goldsmith's shop. G

**[10]** Mohd Fauzan bin Adnan (SP3), a student of a Polytechnic at Port Dickson, was driving a motorcar at the material time along the stretch of Taman Pilah Perdana. It was on 9 October 2007 at about 3.20pm when he heard a loud noise emanating from a motorcycle. He was on his way to the snooker centre. He focussed his attention towards the motorcycle and he saw two male persons wearing crash helmets who were riding the motorcycle in a hurried manner and parked the said motorcycle by the side of the road without switching off the motorcycle's engine and rushing towards a GEN-2 motorcar, orangey red in colour, that was parked across the street facing the direction of Seremban. H I

A Witnessing such an alarming episode prompted SP3 to call the emergency number 999. SP3 described the two male persons in this way. The rider of the motorcycle was bigger and taller than the passenger who sat on the pillion.

B **[11]** SP3 saw the two male persons entered the GEN-2 motorcar and the said motorcar then sped off in the direction of Seremban. According to SP3, he was unable to see the faces of the two male persons because they were wearing crash helmets. SP3 was also unable to remember the registration numbers of the C motorcycle and the GEN-2 motorcar. After SP3 had called the emergency number 999, he met three policemen and he quickly told them what he had seen.

**[12]** Corporal RF 126064 Md Zarin bin Abd Samad (SP14) D was on duty on 9 October 2007 at about 3.20pm at the control centre of the Kuala Pilah district police headquarters when he received information about the robbery and he circulated that information *via* telecommunication as well as informing the duty investigating officer, Inspector Pusparani a/p Palaniandy, about the E incident. SP14 also lodged the first information report on 9 October 2007 at about 4.26pm *vide* Kuala Pilah report number 003110/07 marked as exh. "P36".

**[13]** On 9 October 2007 at about 3.30pm, Chief Inspector Noor Azhar bin Noor Mohamed (SP15) was on duty at the F ceremony for the road safety campaign at Complex Rakan Muda, Kuala Pilah when he received information *via* walkie talkie from the operation room of the Kuala Pilah district police headquarters about the robbery at the goldsmith's shop at Kuala Pilah town. That information pertained to two male suspects that fled using a G motorcycle and proceeded in the direction of Bahau. Based on that information, SP15 set up two police teams comprising of SP15 himself and Chief Inspector Mat Ghani bin Lateh (SP16) with a few other police personnel. SP15 and his police personnel used two vehicles. SP15 used a police Kancil motorcar together H with Sergeant Major Sulaiman and Constable Farid and they headed towards Seremban.

**[14]** On the way to Seremban, SP15 received information from the Kuala Pilah operations room that members of the public saw I two male persons behaving in a suspicious manner entering into an orangey red coloured Proton GEN-2 motorcar and the said motorcar was driven at a fast speed towards Seremban.

The Proton GEN-2 motorcar also had a white sticker displayed at the left rear windscreen. Soon thereafter, a patrol car on the stretch of NS 115 highway relayed information that the Proton GEN-2 motorcar was sighted heading in the direction of Seremban.

**[15]** SP15 and his team continued to proceed in the direction of Seremban. About ten (10) minutes later, SP15 saw the Proton GEN-2 motorcar was detained by the patrol car and the traffic unit headed by Lance Corporal Puasa bin Husin (SP18). SP15 also saw the police personnel armed with firearms pointed at the direction of the driver and passenger of the Proton GEN-2 who were still seated in the said motorcar. SP15 then approached the Proton GEN-2 motorcar from the front and saw two persons in the said motorcar and directed the driver to get out of the said motorcar. As the driver alighted from the said motorcar, SP15 saw him act in a chaotic, anxious and wrathful manner. According to SP15, the driver of the Proton GEN-2 motorcar was very angry and the driver said "mengapa acukan senjata ke arah saya, saya tidak boleh kalau orang acukan senjata kepada saya, saya jadi menggelabah" (why point a gun at me, I cannot stand it and I would be nervous if anyone were to point a gun at me). At that time, the driver of the Proton GEN-2 declared that he is a policeman and requested the police who pointed the gun at him to point it downwards. When the driver of the Proton GEN-2 was directed to get out of the said motorcar, the door on the driver's side was left ajar.

**[16]** SP15 coaxed the driver of the Proton GEN-2 to calm down and told him that his motorcar was detained based on information received. At that time SP15 also saw another male person was seated on the front left passenger's side. When SP15 peeped in, he saw that the front left passenger was shivering and both hands sustained minor injuries. When asked, the front left passenger just kept quiet and the driver of the Proton GEN-2 explained that the passenger was an aborigine and was not able to understand what SP15 had said. SP15 directed Sergeant Major Sulaiman to get the passenger of the Proton GEN-2 out of the said motorcar.

**[17]** At that point of time, the driver of the Proton GEN-2 asked SP15 as to why he was arrested bearing in mind that he was also a member of the police force attached to the Dang Wangi police station. SP15 asked the driver of the Proton

A GEN-2 to remain calm. SP15 noticed that inside the Proton GEN-2 there was a grey coloured crash helmet together with a red and blue coloured bag at the rear seat of the said motorcar and a "parang" placed inside a yellow sheath and placed on the floor board behind the driver's seat. SP15 then asked the driver of the B Proton GEN-2 regarding the items found inside the said motorcar and he replied that these items were used for the purpose of fishing and that the injuries sustained by the passenger of the said motorcar was as a result of "menebas hutan ketika pergi memancing" (clearing a path through the forest while out fishing). C The driver of the Proton GEN-2 invited SP15 to open the boot of the said motorcar and on opening SP15 found paraphernalia connected with fishing and there was also a container containing a few fish. SP15 then closed the boot of the Proton GEN-2 motorcar and directed his men to handcuff the driver of the said D motorcar. But the driver of the said motorcar became aggressive and put up a fight in an attempt to prevent his hands from being handcuffed. When the right hand of the driver of the said motorcar was handcuffed, he continued to struggle and made an attempt to get nearer to the driver's seat of the said motorcar. E But he was unsuccessful because SP15 prevented him from doing so. However, the driver of the said motorcar only managed to grab the cover of the driver's seat which caused the cover to be exposed. At that moment, SP15 saw a pistol located underneath the seat cover. SP15 then directed his men to handcuff both F hands of the driver of the said motorcar. But the driver of the said motorcar continued to struggle and he was eventually subdued when he was pinned down onto the road surface.

**[18]** Both the driver of the Proton GEN-2 and the passenger G were taken to the Kuala Pilah district police headquarters in separate vehicles. While SP15 drove the Proton GEN-2 with SP6 to the police station and the pistol which was located underneath the seat cover of the driver's seat was left untouched.

H **[19]** On arrival at the police station, SP15 parked the Proton GEN-2 at the parking lot meant for the district police chief and directed lance corporal Zamzuri to encircle the said motorcar with the police tape. SP15 then proceeded to the inquiry office where both the driver and the passenger of the Proton GEN-2 were waiting and SP15 directed that they be taken to the briefing room. I

**[20]** At the briefing room, SP15 bodily examined the driver of the Proton GEN-2 witnessed by SP16 and SP15 found one wallet on the right pocket of the driver's trousers. On opening the said wallet, SP15 found a police authority card in the name of Mazlan bin Othman, one identity card in the name of Mazlan bin Othman and cash amounting to RM270. The driver of the Proton GEN-2 was duly identified as Mazlan bin Othman and hereinafter he will be referred to as the "appellant". Next, SP15 proceeded to examine the appellant further by putting SP15's hands inside the front right pocket of the appellant's trousers and found a bundle of jewelleries mixed together with glass splinters. SP15 took out the bundle of jewelleries and found them to comprise of eight (8) gold chains of different sizes. A further examination of the appellant revealed the recovery of a chocolate leather casing containing a magazine and inside that magazine was fourteen (14) rounds of 9mm ammunition.

**[21]** The passenger of the Proton GEN-2 was also examined physically and on him SP15 found a wallet containing one identity card and cash in the sum of RM48. The name of the passenger was Zulkifli bin Ali and he has since died - hereinafter referred to as the "deceased".

**[22]** SP15 handed all the exhibits seized from the appellant and the deceased to SP16 and this was witnessed by both of them - referring to the appellant and the deceased.

**[23]** SP15 proceeded to examine the Proton GEN-2 motorcar witnessed by the appellant and the deceased and SP15 found the following items:

(a) a pistol, type Styer, bearing serial number 031096 located underneath the seat cover of the driver's seat containing 12 rounds of 9mm ammunition;

(b) one hand guard casing at the right side door of the said motor car;

(c) one 9mm ammunition found underneath the mat of the driver's floor board;

(d) one grey coloured crash helmet carrying the brand name "Magnum" found at the back centre seat of the said motorcar;

A (e) one red and blue coloured bag bearing the writing "outdoor rangers" and inside it contained a black jacket and a blue coloured bag carrying the brand name "schwangenangeluest"; and

B (f) one maroon coloured sling bag containing a pair of leather gloves bearing the writing "Easter Sport".

**[24]** SP15 lodged a police report *vide* Kuala Pilah report no: 3123/07 which was marked as exh. "P37" and SP15 also issued the search list marked as exh. "P38".

C

**[25]** All the items were then handed over to SP16 by SP15. Later SP16 re-handed the same items to SP15 for him to mark them as exhibits. This was done and SP15 marked all the items as exhibits in the following manner:

D

(a) One chain C4-F (exh. "P14");

(b) One chain C4-G (exh. "P15");

(c) One gold chain C4-C (exh. "P16");

E

(d) One gold chain C4-D (exh. "P17");

(e) One gold chain C4-E (exh. "P18");

(f) One gold chain C4-B (exh. "P19");

F

(g) One gold chain C4-A (exh. "P13");

(h) One gold chain C4-H (exh. "P20").

**[26]** All the exhibits in para. (a) to para. (h) were recovered from the front right pocket of the appellant's trousers.

G

**[27]** SP15 continued to mark the following items as exhibits:

(i) Firearm C11 (exh. "P23");

H

(j) Magazine C12 found inside the pistol (exh. "P25");

(k) Leather casing C7 (exh. "P40");

(l) Plastic containing ammunition C15 (exh. "P41");

I

(m) Nine rounds of ammunition C6 A-I (exhs. "P42A-I");

(n) Magazine containing 9 rounds of ammunition (exh. "P43");

(o) Twelve (12) rounds of ammunition in the magazine found inside a pistol C13A (exhs. "P27A-L");

(p) A grey coloured crash helmet (exh. "P44");

(q) A blue and red coloured bag C18 (exh. "P45");

(r) A blue coloured bag C20 (exh. "P46");

(s) A handful of jewelleries C20 (exhs. "P21A-J");

(t) One "parang" C16 (exh. "P47");

(u) Glass fragments A27 (exh. "P52").

**[28]** SP15 also identified the photograph of the Proton GEN-2 (exh. "P11") that was taken by Lance Corporal Suresh a/l Chelliah (SP6). Under cross-examination, SP15 testified that at the place where the GEN-2 motorcar was stopped, SP15 told the appellant that the appellant was a suspect in the robbery case.

**[29]** On 9 October 2007, ASP Normanshah bin Din (SP4) - the investigating officer of this case, proceeded to the goldsmith's shop at the address as stipulated in the charges accompanied by the police photographer Lance Corporal RF/119665 Mazri bin Hj Mohd Kasim (SP5). On arrival, SP4 found that the grille door of the goldsmith's shop was slightly ajar and encircled with a police tape. On entering the goldsmith's shop, SP4 found that the glass showcases were smashed to smithereens ("cermin show case pecah bertaburan") and SP4 also found a hammer. Droplets of blood were also found on the floor together with a towel and one bullet casing. Inside the broken showcase, SP4 saw scattered jewelleries and the grille covering the showcase was dented to the left and right approximately five (5) inches apart. SP4 was also told that the motorcycle that was used by the suspects was found abandoned by the side of the road at Jalan Bukit Putus/Jalan Seremban and the next day SP4 proceeded to that place. SP4 also prepared the rough sketch plan (exh. "P49") and the key (exh. "P49K") thereto. Marking "A13" in the rough sketch plan (exh. "P49") showed the broken glasses while marking "A1" therein reflected the bullet casing. In regard to the photographs (exh. "P10") taken by SP5, SP4 identified the droplets of blood found on the exhaust of the motorcycle and one bullet casing found at the scene of the crime.

A **The Appellant's Defence Given On Oath**

**[30]** It was an alibi defence. That the appellant was not at the scene of the crime at the material time but was with his relative by the name of "Uda" (Hasnan bin Abdul Malek (SD3)) at the
B Kuala Pilah Bazaar Ramadan between about 2.30pm to about 3.30pm on 9 October 2007. That the appellant's motorcar was left with his friend, who was the deceased. That the appellant's hand gun as well as his hand phone had all been left in his motorcar. That it was SP15 who had put the bundle of jewelleries
C inside the front right pocket of the appellant's trousers at the police station when the appellant was blindfolded. That the appellant denied firing any shot from his service pistol be it on 8 October 2007 or on 9 October 2007. That the appellant did not know who had fired from his Styer pistol. That the Styer
D pistol was issued by the Police DiRaja Malaysia ("PDRM") in his name. That on 9 October 2007, the pistol was not kept on his waistband throughout the day ("tidak sentiasa berada di pinggang saya").

E **[31]** The appellant also denied committing the robbery and firing the shot from his service pistol on 9 October 2007 at the goldsmith's shop. The appellant alleged that his pistol was used by someone else.

**[32]** The appellant testified that while he was talking to SD3 for
F about an hour at the Kuala Pilah Bazaar Ramadan, the deceased came and handed to the appellant, the appellant's hand phone. The deceased told the appellant that there was a text in the form of Short Message Service (SMS) on the appellant's hand phone. Upon checking, the appellant found that it was the appellant's
G wife who had sent the SMS text enquiring whether he had returned to Kuala Lumpur and if so why they did not meet one another on the road. According to the appellant, he then asked the deceased where the GEN-2 motorcar was parked because his pistol was inside the said motorcar. The deceased did not reply
H but instead handed to the appellant the keys to the GEN-2 motorcar. According to the appellant, when his wife sent him the SMS text, he has yet to buy anything at the Kuala Pilah Bazaar Ramadan.

I **[33]** The appellant testified that perhaps someone else had used his Styer pistol because the chemist report stated that the deoxyribonucleic acid (DNA) of an unknown male other than the appellant or the deceased was recovered from the GEN-2

motorcar. The appellant also said that the Styer pistol was used by someone else because the keys to the GEN-2 motorcar were left with the deceased at the Kuala Pilah Bazaar Ramadan.

**[34]** The appellant also testified that at the place of arrest before he was taken to the IPD Kuala Pilah, he was not examined physically by any police officer. And this was confirmed by SP15 under cross-examination.

**[35]** SM Mohd Haizat bin Abdul Jalil (SD2) testified for the defence. SD2 testified that on 9 October 2007, he was present at the briefing room of the Kuala Pilah district police headquarters. And that when he entered the briefing room, he saw the appellant was seated and was blindfolded. SD2 did not know who had blindfolded the appellant. From there, the appellant was taken to the garage where the GEN-2 motorcar was parked. There, the appellant was not blindfolded and at a distance he saw some police personnel examined the said motorcar. Under cross-examination, SD2 admitted:

(a) that sometimes while interrogating a suspect, the suspect will be blindfolded; and

(b) that the purpose of the blindfold is to prevent the suspect from seeing his interrogator.

**[36]** Under cross-examination, SD2 testified that, "Bila mata seseorang itu tidak nampak ia tidak boleh berfikir. Jika boleh melihat ia boleh dan membuat cerita" (When a person is blindfolded, that person cannot think. If that person can see that person will create a story). SD2 agreed that the appellant could recognise his voice and that the appellant said, "Haizat, tolong aku ni projek D9 dan aku" (Haizat, please help me. This is D9's project and mine). Again, under cross-examination, SD2 testified that when a person is blindfolded, that person could not see at all. Again, under cross-examination, SD2 testified that when he was in the briefing room where the appellant was blindfolded, he did not see SP15 or SP16 in the said room. SD2 was unsure how long the appellant was blindfolded. Under re-examination, SD2 testified that when the appellant was blindfolded, the appellant was not interrogated.

**[37]** SD3, a relative of the appellant, gave evidence for the defence. SD3 said that he is the cousin of the appellant. SD3 testified that the date 9 October 2007 was towards the end of

A the month of Ramadan. On that date, SD3 met the appellant at the Kuala Pilah Bazaar Ramadan at about 2.30pm. (At this juncture, the prosecution objected to the admission of SD3's evidence because no notice of alibi was given to the prosecution under s. 402A of the Criminal Procedure Code ("CPC"). But the B learned JC allowed SD3 to proceed to give his evidence and His Lordship said that a decision would be made at the end of the defence case). So, SD3 continued with his testimony. SD3 said that he met the appellant at the Kuala Pilah Bazaar Ramadan by coincidence. SD3 said that he was alone at that time and so was C the appellant. They talked about family matters and exchanged news for about 40 minutes to an hour. While talking, the appellant's friend came and SD3 excused himself and they parted company. After 9 October 2007, SD3 said that he never met the appellant again. According to SD3, that four (4) days after D 9 October 2007, he heard through his relative that the appellant was arrested. SD3 said that he did not know why the appellant was arrested.

**[38]** Under cross-examination, SD3 said that four (4) days after E he met the appellant, he did not know why the appellant was arrested. The younger sibling of the appellant told SD3 three (3) months to one (1) month earlier to attend court on that day and to tell the truth.

F **[39]** The following questions and answers were elicited from SD3 during cross-examination:

S : Dia minta awak beritahu di mana OKT berada pada 9.10.2007.

G J : Tidak. Sebelum ini kami berbincang. Saya tidak tahu tentang ia ditangkap. Saya beritahu adiknya pada masa itu saya berada dengannya.

S : Keterangan awak hari ini penting.

H J : Saya tidak tahu kejadian pukul berapa.

S : Macam mana boleh timbul tarikh dan jam 2.30 petang. Macam mana boleh timbul mesyuarat keluarga.

J : Saya diberitahu oleh saudara OKT yang ia ditahan. Saya I beritahu OKT ada bersama saya waktu itu. Saya sendiri cakap dengan keluarga, tarikh dan masa itu saya berada dengan OKT.

S : Macam mana boleh cakap.

J : Saudara beritahu OKT telah ditahan oleh polis dan ia beritahu tarikh. Saya terperanjat dan beritahu dia lebih kurang 2.30 petang saya ada berjumpa dengan OKT. Adik OKT tidak beritahu pukul berapa OKT ditangkap. Perbincangan pada tahun 2009. Saya belajar sampai Tingkatan 3, SMK Abdul Samad, Tanjong Ipoh.

S : Adakah keluarga beritahu statement kepada polis.

J : Tidak, saya rasa tidak penting. Sebelum masuk Mahkamah, saya tidak tahu keterangan saya hari ini penting atau tidak.

S : Kamu telah diajar untuk beri keterangan hari ini.

J : Tidak setuju.

S : Kamu tidak pernah berjumpa OKT pada bila-bila masa pada 9.10.2007.

J : Tidak setuju.

S : Kamu tidak pernah berjumpa dengan OKT di Bazar Ramadan pada 9.10.2007 jam 2.30 petang.

J : Tidak setuju.

S : Bagaimana rupa rakan OKT.

J : Badan dan tingginya lebih kurang sama dengan OKT. Rupanya saya tidak dapat jelaskan. Pakaiannya saya tidak ingat ia pakai baju cerah (putih) dan seluar gelap (jeans). Dia ada beritahu ia sengaja hendak ke Kuala Pilah berjumpa isterinya - masalah keluarga. Ia baru balik dari memancing ikan.

S : Awak tidak pernah jumpa rakan OKT pada 9.10.2007.

J : Tidak setuju.

S : Pada 9.10.2007, OKT dan seorang rakannya jam 3.15 petang sedang melakukan rompakan dan melepaskan tembakan di sebuah kedai emas.

J : Tidak setuju.

**[40]** There was no re-examination of SD3.

**[41]** It must be emphasised that the defence of alibi was challenged by the prosecution because of the absence of the requisite notice under s. 402A of the CPC.

A **Analysis**

*Whether The Prosecution Has Succeeded In Establishing A Prima Facie Case?*

B **[42]** It was argued that the learned JC erred in law and in fact in holding at the end of the prosecution's case that the prosecution had made out a *prima facie* case against the appellant on both the charges which warranted the appellant entering his defence when both in fact and in law there was no evidence and/ or insufficient evidence that warranted such a finding being made.

C

**[43]** The two charges levied against the appellant concerned the commission of an armed robbery and discharging a firearm in the course of that robbery. The learned JC focussed his attention to these two charges when he alluded to the requisite elements D essential to prove the two charges. At p. 19 of the appeal record at Jilid 1, this was what His Lordship said:

> 25. Elemen-Elemen Yang Perlu dibuktikan bagi Pertuduhan 45-8-2008 ialah:
>
> E (a) OKT telah melepaskan tembakan daripada senjata api iaitu sepucuk pistol jenis STYER dengan nombor siri 031096.
>
> (b) OKT telah melepaskan tembakan tersebut pada masa melakukan satu kesalahan berjadual iaitu rompakan.
>
> F (c) Semasa melepaskan tembakan tersebut OKT mempunyai niat untuk mencederakan seseorang.

**[44]** This approach was certainly in tangent with the decision of G this court in *Low Soo Song v. PP* [2008] 1 CLJ 433. At pp. 436 to 437 of the report, this court had this to say:

> (5) We now turn to consider the question whether the prosecution had *prima facie* established the ingredients of the offence at the close of its case. What the prosecution had to H prove is:
>
> (i) that there was a robbery;
>
> (ii) that the appellant discharged a firearm in the commission of that robbery;
>
> I (iii) that the appellant intended to cause death or hurt to some person.

(6) By virtue of section 390 of the Penal Code, theft is an element of robbery. Consequently, the act of the appellant's friend forcibly removing the chain and bracelet from the person of PW3 without her true consent amounted to theft. So, the first ingredient is satisfied. As for the second and third ingredients, there is the evidence of PW3 that it was the appellant who discharged the firearm resulting in PW4 being injured. There is no doubt that in these circumstances it is an irresistible inference that the appellant had the required intent proscribed by section 3 of the Act. The appellant's submission on this point accordingly fails.

**[45]** It is pertinent to mention that the appeal by *Low Soo Song* to the Federal Court was dismissed and the decision of the Court of Appeal was affirmed *vide* [2009] 3 CLJ 309.

**[46]** In the present appeal, the strands of circumstantial evidence connecting the appellant to the two charges constitute proof beyond reasonable doubt. We have the evidence of SP10 and SP8 who testified that two individuals entered the goldsmith's shop wearing face masks, black jackets, jeans and crash helmets and that one was taller than the other. According to them, the shorter individual carried a hammer. SP10 also described how he was shot on his left shoulder and fell to the ground. While the shorter individual used a hammer to smash the glass showcase and the robbers then scooped the jewelleries and put them inside the pockets of their jeans. The robbers then fled using a motorcycle.

**[47]** The movements of the robbers were narrated by SP3 who then alerted the police which led to the arrest of the appellant and the deceased. That the service pistol was assigned to the appellant and was proved to have been fired together with the recovery by SP15 of a bundle of jewelleries mixed with glass splinters inside the front right pocket of the appellant's trousers pointed to the guilt of the appellant. The allegation that SP15 had planted it there was an incredible version bearing in mind that the appellant himself was a police Sergeant at the time of his arrest.

**[48]** According to Lord Salmon in *Director of Public Prosecutions v. Kilbourne* [1973] AC 729, HL, circumstantial evidence "works by cumulatively, in geometrical progression, eliminating other possibilities". In *Bakshish Singh v. The State of Punjab* AIR 1971 2016, 2018, SC, the Indian Supreme Court re-affirmed the principle when dealing with cases that relied on circumstantial evidence in these words:

> In a case resting on circumstantial evidence, the circumstances put forward must be satisfactorily proved and those circumstances should be consistent only with the hypothesis of the guilt of the accused. Again those circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved. In other words, there must be a chain of evidence so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability the act must have been done by the accused.

**[49]** But Lord Normand in *Lejzor Teper v. The Queen* [1952] AC 480, HL, at p. 489 sounded a warning to the effect that, "It is also necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference".

**[50]** Where the prosecution relied on circumstantial evidence, the correct test for the judge sitting alone to apply would be to follow the advice of Suffian LP in *Jayaraman Velayuthan & Ors v. PP* [1982] CLJ 464; [1982] CLJ (Rep) 130, FC at p. 138:

> So in a case tried without a jury and depending on circumstantial evidence, in our judgment, respectfully following *McGreevy v. Director of Public Prosecutions* [1973] 1 WLR 276, [1973] 1 All ER 503, it is enough for the trial judge to remember only that the prosecution need prove its case beyond reasonable doubt, and failure by him to also say that the circumstances are not only consistent with the accused having committed the crime but also such that they are inconsistent with any other reasonable explanation, is not fatal. In other words, we agree with Encik Mokhtar that the answer to question 1 is yes, it is correct - meaning that in a case depending on circumstantial evidence, it is enough if the court merely says that it is satisfied of the accused's guilt beyond reasonable doubt, without further saying that the facts proved irresistibly point to one and only one conclusion, namely the accused's guilt.

**[51]** In the absence of direct and positive testimony of eye witnesses, it is permitted to infer from the facts proved, other facts necessary to prove the element of guilt. It has often been said that circumstantial evidence is often the best evidence. It is evidence of surrounding circumstances which, by undesigned coincidence, is capable of proving the guilt of an accused person with mathematical accuracy (*Percival Leonard Taylor, James Weaver v. George Thomas Donovan* [1928] 21 Cr App R 20, CCA).

**[52]** The learned JC was sure of himself that the facts proved are not only consistent with guilt but also inconsistent with any other reasonable conclusion (*McGreevy v. Director of Public Prosecutions* [1973] 1 WLR 276, HL) in the context of circumstantial evidence.

**[53]** The pertinent circumstantial evidence to be considered in the context of this appeal would be:

(a) the evidence of Sergeant Muhamad Zain bin Bardan (SP13) – the retired police officer, who testified that it was his duty to monitor the movements of firearms and ammunition on 4 October 2007 at Dang Wangi police station. According to SP13, the records showed that firearm bearing serial number 031096 was issued in the name of the appellant and the appellant took custody and possession of the firearm on 4 October 2007 and he did not return it. And at the time of his arrest, the same firearm bearing serial number 031096 – the Styer pistol, was found in the Proton GEN-2 motorcar;

(b) the "Arms In and Out Register" marked as exh. "P35" as seen at pp. 90 to 104 of the appeal record at Jilid 2 showed that the Styer pistol (exh. "P23") was handed to the appellant on 4 October 2007 at 3.55pm together with 30 rounds of 9mm ammunition. It must be borne in mind that approximately 30 to 45 minutes after the robbery at the goldsmith's shop where SP10 was shot, SP15 and SP16 arrested the appellant while driving the Proton GEN-2 motorcar. At the police station, SP15 found the Styer pistol (exh. "P23") underneath the seat cover of the driver's seat of the Proton GEN-2 containing 12 rounds of 9mm ammunition;

(c) ASP Nurdin bin Udin (SP12), the armament officer, test fired the Styer pistol (exh. "P23") using three out of the 12 mm ammunition and he found both the Styer pistol (exh. "P23") and the ammunition to be serviceable;

(d) When SP16 was being cross-examined, it transpired that the appellant admitted as to the ownership of the Styer pistol (exh. "P23"). Under cross-examination, this was what SP16 testified (see p. 123 of the appeal record at Jilid 1):

A S : Sebelum OKT dan seorang lagi dibawa ke Balai Polis Kuala Pilah, OKT ada beritahu 'Tuan, pistol saya ada di atas seat bawah lapik'.

J : Ada.

B (e) This piece of incriminating evidence is admissible because it surfaced during the cross-examination of the appellant by the appellant's own counsel. And this point was settled by the Federal Court in the case of *Law Tim Wah v. PP* [1977] 1 LNS 51; [1978] 1 MLJ 167, when Lee Hun Hoe CJ (Borneo) C speaking for the Federal Court at p. 168 said:

> It was alleged that the learned judge admitted and took into consideration inadmissible and highly prejudicial evidence resulting in a miscarriage of justice. This matter must be carefully examined. It is proper to bear in mind that we are D not dealing with a jury trial or with a direction to a jury, but with a judge's expression of his views. We do not think it is wrong for the police to use photographs before arrest to assist them in ascertaining the proper person to be arrested, but the photographs should not be tendered in E evidence by the prosecution. Thus, in *Girdari Lall and Others v. Public Prosecutor* [1946] MLJ 87 the Court of Appeal quashed the conviction because a police photograph of an accused was put in evidence. We see no reason why counsel for appellant should complain about what he called prejudicial evidence when these arose as a result of cross- F examination.

(f) Based on the evidence of SP12 and the chemist report marked as exh. "P6", the bullet casing (kelongsong peluru) that was found at the goldsmith's shop by SP4 – the G investigating officer, was stated by the government chemist in his chemist report in exh. "P6" to have been fired from the Styer pistol (exh. "P23"). Although the government chemist in the person of Muhammad Fauzi bin Ghazali was not called as a witness by the prosecution, yet this chemist report marked H as exh. "P6" was accepted by the learned JC pursuant to s. 399 of the CPC. There was evidence emanating from SP4 that exh. "P6" was served on the appellant on 13 November 2009 at 10.30am and that exceeded the ten (10) days requirement as stipulated in s. 399 of the CPC. And learned I counsel confirmed before the learned JC that the appellant did not give notice to the public prosecutor not less than three (3) clear days before the commencement of the trial pursuant

to s. 399(1)(b) of the CPC for the government chemist to attend court as a witness. In this context, it is ideal to refer to the judgment of Kang Hwee Gee J (later JCA) in the case of *PP v. Lam Peng Hoa & Anor* [1996] 3 CLJ 747. There at pp. 753 to 754, His Lordship had this to say:

> The chemist report Exhibit P32 had been served on both the accused by the investigating officer in compliance with the ten clear days requirement under s. 399 of the Criminal Procedure Code. As the defence had not given any notice under s. 399(1)(b) to require the attendance of the chemist, the report must therefore be accepted as conclusive evidence for the prosecution of the finding of the chemist with respect to the nature of drug recovered and its total weight. When the learned Deputy Public Prosecutor proposed to call the same chemist to give evidence, I had to act under s. 136 of the Evidence Act 1950 to require her to state in what manner the evidence she proposed to elicit from the chemist would be relevant. On being informed that the chemist would be called to explain the conduct of her analysis in the drug, I ruled that the chemist if called would not be allowed to give any evidence in respect of the conduct of her analysis of the drug, for the following reasons:
>
> (i) The chemist report had already been admitted into evidence. It is trite law that if a chemist is called as a witness to testify on matters pertaining to his analysis of the drug, the chemist report prepared by him would not be admissible, save that it may be tendered not as a substantive evidence of its contents but as corroboration of his oral evidence in court under s 157 of the Evidence Act 1950 (see *Saw Thien Teik v. Regina* [1953] 19 MLJ 124, followed in *Public Prosecutor v. Lin Lian Chen* [1990] 2 CLJ 1020). Conversely, if the chemist report has been tendered as substantive evidence under s. 399 of the CPC, it follows that no oral evidence can be given by the chemist in respect of his analysis of the drug. To allow the chemist to give such evidence would tantamount to allowing the admission of two sets of substantive evidence from the same witness which the prosecution would not have otherwise been entitled to do had they called the chemist to give oral evidence.

(ii) Section 91 of the Evidence Act 1950 applies.

> A chemist report is not *per se* a 'matter' required by law to be in the form of a document as in the case of a police report under s. 107 and a statement under s. 112 of the Criminal Procedure Code. But once the chemist report had been admitted as substantive evidence under s. 399 of the Code it falls squarely into that class of matter 'required by law to be reduced to the form of document' under s. 91 of the Evidence Act 1950. It would not therefore be permissible by the operation of s. 91 for the prosecution to give any other evidence in proof of the matter except the document (the chemist report) itself.

(g) The impact of s. 399 of the CPC was also explained by Abdul Aziz J in *PP v. Subramaniam* [1968] 1 LNS 112 in these salient words:

> At the close of the prosecution, the learned president discharged the accused on the sole ground that since the radiographer was not called there was no evidence that the fracture shown on the X-ray film was that of the complainant. Consequently he held that there was no *prima facie* case of grievous hurt. In passing he remarked that the case was poorly investigated. No statements were taken from independent witnesses. Since these independent witnesses were not called to give evidence, it was right he should also invoke section 114(g) of the Evidence Ordinance.
>
> In my view the learned president erred in discharging the respondent on the ground that the radiographer was not called. He seemed to have lost sight of the fact that the medical report was properly admitted as evidence under section 399 of the Criminal Procedure Code and that report clearly showed that the complainant suffered a fracture of the skull. The fact that the contents of the report have not been proved to the hilt matters little. In any event under section 399 it is the duty of the respondent to give notice if it requires such strict proof.

(h) The chemist report in exh. "P6" also confirmed that the bullet retrieved from the left shoulder of the victim – SP10, came from the Styer pistol (exh. "P23"). The chemist report in exh. "P6" also confirmed that when the chemist received the Styer pistol (exh. "P23"), it had gun powder residue. This

showed that the Styer pistol (exh. "P23") that was seized from the GEN-2 motorcar had just been used. And that Styer pistol (exh. "P23") was in the possession of the appellant.

**[54]** The learned JC who had audio-visual advantage accepted the evidence of the prosecution's witnesses. We declined to interfere with the findings of the learned JC. This court in *Andy Bagindah v. PP* [2000] 3 CLJ 289, 292, echoed the same sentiments:

> Since this involved the credibility of witnesses, we held that the learned judge was a better person to decide and an appellate court ought not to interfere with such findings.

**[55]** In regard to the Styer pistol (exh. "P23") that was test-fired by SP12 and found to be serviceable, the learned JC made the following findings of fact (see p. 20 of the appeal record at Jilid 1):

> (i) Pistol STYER dengan nombor siri 031096 (selepas ini dirujuk sebagai 'PISTOL' tersebut) adalah satu senjata api bagi maksud Seksyen 2 Akta tersebut
>
> Keterangan ASP Nordin (SP12) iaitu seorang pegawai polis daripada Bahagian Persenjataan, IPK Negeri Sembilan jelas menunjukkan pistol tersebut mempunyai laras dan cas letupan. Pistol yang diuji tersebut telah mengeluarkan letupan dan laporan kimia (P6) juga telah menunjukkan pistol tersebut boleh melepaskan tembakan.
>
> (ii) Pistol tersebut adalah di dalam keadaan 'serviceable'.
>
> Berdasarkan keterangan SP12 yang telah membuat uji tembak dan laporan kimia P6, adalah diputuskan bahawa pistol tersebut dalam keadaan serviceable.
>
> (iii) Pistol tersebut berada dalam milikan OKT sebelum kejadian. Menurut buku persenjataan POLIS 74C (Eksibit P35), pistol tersebut telah dikeluarkan kepada OKT oleh seorang anggota polis di IPD Dang Wangi pada 4.10.2007. Pistol tersebut tidak pernah dipulangkan semula ke sektor persenjataan. Tiada apa-apa cadangan oleh pihak pembelaan bahawa pistol tersebut ada pada orang lain sebelum kejadian pada 9.10.2007 jam 3.15 petang melainkan pada OKT.

**[56]** The appellant was in possession of the Styer pistol (exh. "P23") after the robbery at the goldsmith's shop and the learned JC held this to be so (see p. 22 of the appeal record at Jilid 1):

> (iv) Pistol tersebut ada di dalam milikan OKT selepas kejadian. Menurut Cif Inspektor Noor Azhar (SP15), pistol ditemui di bawah pelapik tempat duduk pemandu kereta yang dipandu OKT. Semasa memandu kereta GEN-2 tersebut, beliau boleh merasakan keadaan terbonjol pistol tersebut di bawah pelapik duduk pemandu. Adalah mustahil OKT tidak mengetahui akan kewujudan pistol tersebut semasa OKT memandu kereta tersebut sebelum ditangkap oleh SP15 (rujuk kes *Public Prosecutor v. Abdul Rahman bin Akif* [2007] 5 MLJ 1).

**[57]** The Styer pistol (exh. "P23") that was issued to the appellant on 4 October 2007 was the same pistol that was found in the possession of the appellant after the commission of the robbery based on the serial number of the said pistol. On these points, the learned JC had this to say at p. 23 of the appeal record at Jilid 1:

> Pada hemat Mahkamah, secara keseluruhannya waktu kritikal tentang kedudukan pistol itu sebelum dan selepas kejadian telahpun terjawab setakat ini berdasarkan keterangan-keterangan yang ada. Seterusnya pistol yang dikeluarkan kepada OKT pada 4.10.2007 adalah pistol yang sama ditemui dalam milikkan OKT sebaik sahaja selepas kejadian berdasarkan nombor siri pistol tersebut.

**[58]** The learned JC also made a finding in regard to the recovery of the bullet casing (kelongsong peluru) based on the chemist report in exh. "P6" and this is reflected in His Lordship's judgment at p. 25 of the appeal record at Jilid 1:

> Finding dalam P6 ini adalah diterima sebagai keterangan yang substantif dan konklusif menurut Seksyen 399 KAJ (rujuk kes *Lam Peng Hoa & Anor* [1996] 5 MLJ 405). Justeru diputuskan bahawa kelongsong P58Ka yang dijumpai di tempat kejadian seperti dalam gambar P10 dan rajah kasar adalah berasal dari pistol tersebut yang dikeluarkan di atas nama OKT.

**[59]** The bullet slug (anak peluru) retrieved from the left shoulder of the victim - SP10, came from the Styer pistol (exh. "P23"). This was the finding of the learned JC (see pp. 25 to 26 of the appeal record at Jilid 1):

> (vi) Peluru yang diperolehi dari badan mangsa Chin Yuen Choon (SP10) telah dilepaskan dari pistol tersebut.
>
> SP4 telah menerima sebutir peluru daripada Dr. Kumar Harirajah iaitu doktor yang menyediakan laporan perubatan (P9) pada 10.10.2007. Eksibit P9 menyatakan di muka surat 2 di bahagian rawatan Exploration of the wound and the removal of bullet done on 10.10.2007. Eksibit P62Ka iaitu bekas plastik yang mempunyai label atas nama SP10 yang mengandungi sebutir peluru telah dicamkan oleh SP4. Berdasarkan laporan kimia P6, anak peluru tersebut telah dibuat perbandingan dengan anak-anak peluru yang telah diuji tembak dengan pistol tersebut dan disahkan P62Ka itu datangnya dari pistol tersebut.

**[60]** The evidence of SP10 and SP8 pertaining to the description of the male individual that pointed the pistol at SP10 and fired the pistol at SP10 at the goldsmith's shop were not challenged by the defence. This was the finding of the learned JC at p. 26 of the appeal record at Jilid 1:

> (vii) Keterangan SP10 dan bapa SP10 iaitu Chin Kaw (SP8). Menurut SP10 dan SP8, mereka nampak dua lelaki yang memakai helmet memasuki kedai mereka dan melakukan rompakan. Seorang lelaki yang memegang sebatang tukul berbadan kecil dan rendah sedikit berbanding dengan seorang lagi lelaki yang berbadan besar dan tinggi. Keterangan berkaitan diskripsi lelaki yang berbadan besar dan tinggi telah mengacukan sepucuk pistol ke arah SP10 dan telah melepaskan tembakan ke atas SP10 semasa di tempat kejadian langsung tidak dicabar oleh pihak pembelaan.

**[61]** Pausing here for a moment and taking stock of the several facts that surfaced through a full blown trial before the learned JC, the pertinent factual matrix are as follows:

(a) that there was a robbery at the Banbau goldsmith's shop on 9 October 2007 at about 3.15pm by two men, one armed with a gun and the other with a hammer;

(b) that the two men went to the goldsmith's shop on a motorcycle;

A (c) that the two men wore face masks, black jackets and crash helmets and were not identified;

(d) that a shot was fired from the gun and SP10 was injured on his left shoulder and he fell to the ground – the shot was fired
B by the big sized and slightly taller man;

(e) that one of the two men smashed the showcases with a hammer – it was the small sized and thin man who did it;

(f) that the two men then scooped the jewelleries from the
C broken showcases and put them inside the pockets of their jeans;

(g) that at about 4pm on 9 October 2007, the appellant was arrested while driving the orangey red GEN-2 motorcar which
D had a white sticker displayed at the left rear windscreen along the Kuala Pilah-Seremban road some 15 kilometres from the Kuala Pilah town with another person by the name of Zulkipli bin Ali (NRIC No: 610428-10-5021) as reflected in the police report lodged by SP15 on 9 October 2007 at about 8.12pm
E (see p. 88 of the appeal record at Jilid 2) who sat at the front passenger seat of the said motorcar;

(h) that the police report lodged by SP15 mentioned the name of the appellant and also mentioned the recovery of a bundle of
F jewelleries from the right pocket of the appellant's jeans (8 utas rantai emas di poket jeans sebelah kanan); and

(i) that the appellant was a police sergeant attached to the Dang Wangi police station and his service pistol was recovered from his motorcar – the orangey red GEN-2 motorcar.

G

**[62]** All these, plus the other evidence alluded to earlier, established a *prima facie* case against the appellant on both the charges. Indeed this was what the learned JC held at the close of the prosecution's case. At p. 33 of the appeal record at Jilid 1,
H the learned JC had this to say and we agree with him:

> Di akhir kes pendakwaan, Mahkamah berpuashati bahawa pihak pendakwaan telah berjaya membuktikan kes *prima facie* bagi kedua-dua pertuduhan terhadap OKT. Oleh itu OKT dipanggil membela diri. OKT telah memilih memberi keterangan bersumpah di kotak
I saksi.

**[63]** The learned JC judicially scrutinised on a maximum evaluation basis the evidence at the close of the prosecution's case following the rigours as set out in *Looi Kow Chai & Anor v. PP* [2003] 1 CLJ 734, CA; and in *Balachandran v. PP* [2005] 1 CLJ 85, FC together with the statutory provisions of s. 180(1) of the CPC.

**In Regard To The Death Of The Deceased And The Marking Of The Deceased's 112 Statement As exh. "P5"**

**[64]** Sariah binti Ali (SP1) – the sister of the deceased (see the spelling of the name of the deceased as recorded by the learned JC at p. 46 of the appeal record at Jilid 1 as Zulkifli bin Ali), testified that her brother was detained at the Sungai Buloh prison and he died on 11 August 2009 and was buried at Kampong Pasir Baru, Semenyih.

**[65]** Learned defence counsel criticised the evidence led in respect of proof of death. He argued that the evidence was seriously lacking in quality and credibility and completely failed to meet the burden of proof required of the prosecution. The prosecution, on the other hand, relied on the evidence of SP1 to prove that the deceased had died on 11 August 2009 and had since been buried and the prosecution then elected to tender the statement of the deceased recorded under s. 112 of the CPC as evidence by marking it as exh. "P5".

**[66]** Learned defence counsel was unhappy that the prosecution relied on exh. "P5" and he submitted that usage of exh. "P5" constituted a serious violation of and contrary to s. 30 of the Evidence Act 1950. It was also submitted that the learned JC failed to apply the correct test in evaluating exh. "P5".

**[67]** There is a judgment of that brilliant judge in the person of Edgar Joseph Jr J (later SCJ) in *PP v. Leong Heo Cheong* [1990] 2 CLJ 818; [1990] 2 CLJ (Rep) 738, which merits reproduction. At p. 742 of the report, His Lordship aptly said:

> I must now turn to examine the merits of the case but before I do so, I wish to make it plain that looking back I am satisfied that the prosecution had established the fact of Sidek's death even without the aid of any death certificate, having regard to the testimony of DPC Mathuveran (PW1), Sgt. Major Majid (PW2), and Woman Constable Aini (PW3), all of whom were colleagues of the accused, and who testified, without challenge, that Sidek had died before the trial commenced. Indeed, Sgt. Major Majid,

A who was the immediate superior of Sidek, had testified that the latter had died on 14 June 1989. The pre-requisite requirement of proof of death under s. 32 was therefore satisfied by the prosecution.

B **[68]** That puts an end to any criticism as to the manner in which the prosecution sought to prove the death of the deceased.

**[69]** However, Mr Mohamad Abazafree bin Mohd Abbas, the learned Deputy Public Prosecutor, graciously conceded that the learned JC erred in admitting the statement of the deceased C recorded under s. 112 of the CPC as an exhibit marked as "P5". He magnanimously submitted that it should not be admitted nor marked as an exhibit. In our judgment, even without exh. "P5", there are overwhelming circumstantial evidence to call the appellant to answer both the charges at the *prima facie* stage.

D

**[70]** That being the case, no more shall be said about exh. "P5".

**[71]** Next, it was argued that the second charge in regard to the E commission of an armed robbery should have incorporated the name of the deceased and the failure to do so was said to have prejudiced the appellant. Although this ground was not incorporated in the Petition of Appeal, it must be stated that the appellant knew about the existence of the deceased and, F consequently, he was not prejudiced. And may we add that by virtue of s. 156 of the CPC, the appellant was not misled by such an error or omission.

**Inadequate Consideration Of The Defence Evidence**

G **[72]** The learned JC considered *in extenso* the defence of the appellant and judicially appreciated the evidence of SD1, SD2 and SD3 as against that of the prosecution and we see nothing wrong with the approach adopted by His Lordship.

H **[73]** It must be borne in mind that:

> An appellate court would be slow to disturb a trial court's finding of fact in the absence of any perverse and unwarranted finding on the totality of the evidence before it.

I (see *Teng Howe Sing v. PP* [2008] 5 CLJ 186, CA).

**[74]** The strength of the prosecution's case lies in the facts adduced by the prosecution through its witnesses. These facts are favourable to the prosecution and they are, with respect, damning to the defence.

**[75]** The defence was one of alibi. That he was not at the scene of the crime at the material time. Rather he was with his relative Uda (SD3) at the Kuala Pilah Bazaar Ramadan between approximately 2.30pm to 3.30pm. That his orangey red GEN-2 motorcar had been left with the deceased. His Styer pistol (exh. "P23") – assigned to him by the police force, as well as his hand phone were all left in the said motorcar.

**[76]** The learned JC allowed this piece of evidence pertaining to the appellant's alibi defence to be adduced and admitted and the learned Deputy Public Prosecutor having conduct of the prosecution at the material time did not object as reflected at pp. 209 to 210 of the appeal record at Jilid 1. The learned Deputy Public Prosecutor even proceeded to cross-examine the appellant on the alibi defence as reflected at p. 221 of the appeal record at Jilid 1.

**[77]** It must be borne in mind that learned defence counsel cross-examined the prosecution witness (SP4) during the prosecution's case on the defence of alibi. At p. 164 of the appeal record at Jilid 1, during the cross-examination of SP4 it was put that:

S : Daripada siasatan tiada cop jari OKT. OKT tidak ada di tempat kejadian pada masa kejadian.

J : Tidak setuju.

**[78]** Again, at p. 165 of the appeal record at Jilid 1, the same line of cross-examination of SP4 was adopted:

S : Dicadangkan OKT tidak berada di tempat kejadian.

J : Tidak setuju.

**[79]** And even the timing and the name of the alibi witness were put to SP4 as seen at p. 171 of the appeal record at Jilid 1:

S : OKT ada memberitahu awak pada 9.10.2007 lebih kurang 3.00 pm ia berada di Bazar Ramadan di Pekan Kuala Pilah.

J : Tidak.

S : Ia ada beritahu saudaranya panggilan Uda.

J : Tidak.

**[80]** It is interesting to note that even after SP4 was recalled by the prosecution, the learned Deputy Public Prosecutor had asked SP4 whether he had received an alibi notice under s. 402A of the CPC. It was submitted that it is a fair assumption to make that the prosecution was thinking ahead and envisaged that the defence was one of alibi. Likewise, it was submitted that it is also a fair assumption to make that the prosecution had been alerted as to the defence of alibi. Again, it was submitted that it is also a fair assumption to make that the prosecution was giving a hint to the defence to put in the alibi notice under s. 402A of the CPC. But the defence was not acting on the cue given by the prosecution. However, these assumptions are mere speculations and they cannot be made by us. We must act on the evidence led before the learned JC.

**[81]** Learned defence counsel invited us to make an assumption that the prosecution had been alerted to the defence of alibi and were conscious of it. We were also invited to make an assumption that the prosecution knew about the defence of alibi from the appellant when he was in police custody and that explained the conduct of the learned deputy when SP4 was asked whether the alibi notice under s. 402A of the CPC was received.

**[82]** Be that as it may, during the court session on 25 May 2010 before the learned JC and when the appellant was giving his evidence under cross-examination, the learned JC asked before the start of the afternoon session at 2.30pm the following pertinent question in regard to the alibi notice under s. 402A of the CPC as reflected at p. 224 of the appeal record at Jilid 1:

> Soalan Mahkamah
>
> Ada atau tidak notis alibi di bawah Seksyen 402A Kanun Prosedur Jenayah dikemukakan daripada (sic) pihak pendakwaan
>
> J : Kami tidak menghantar notis alibi kepada pihak Pendakwa Raya atas alasan kesuntukan masa.
>
> Kami akan memanggil Uda.

**[83]** Thus, there was no alibi notice as required under s. 402A of the CPC, yet SD3 was called and he gave his evidence. Midway through, the learned Deputy Public Prosecutor objected and the learned JC took note of the objection but His Lordship permitted SD3 to continue with his testimony and the learned JC stated that he would make a decision on the objection at the end

of the defence case. The notes of evidence at p. 235 of the appeal record of Jilid 1 recorded the objection of the learned Deputy Public Prosecutor in these words:

> Timbalan Pendakwa Raya
>
> Kami membantah keterangan saksi pada peringkat ini kerana ia adalah evidence in support yang dikatakan di bawah Seksyen 402A CPC.
>
> Mahkamah : Bantahan Timbalan Pendakwa direkod dan saksi dibenarkan meneruskan keterangan dan keputusan akan dibuat di akhir kes pembelaan.

**[84]** But, at the end of the defence case there was no ruling by the learned JC (see p. 238 of the appeal record at Jilid 1) at all.

**[85]** Flowing from all these, it was submitted by learned defence counsel that the learned JC did not make a ruling in regard to the reception of alibi evidence and His Lordship permitted the learned Deputy Public Prosecutor to cross-examine both the appellant and SD3 at length and this led the defence to believe that the alibi defence and the evidence thereto were properly before the court and would be considered in the evaluation of the defence case. It was further submitted that the failure on the part of the learned JC to promptly make a ruling had prejudiced the defence in the proper presentation of the defence case.

**[86]** It was also submitted by learned defence counsel that the defence of the appellant was not a bare denial. According to learned defence counsel a bare denial envisages the situation where the appellant testifies and states, "I did not do it", and the appellant then sits down. That, according to learned defence counsel, would be a defence of bare denial unsupported by other evidence. Here, according to learned defence counsel, the appellant gave evidence and led a concrete and substantial evidence of other events supported by SD2 and SD3 which showed a completely different version as to what had actually transpired. Learned defence counsel submitted that the version of the appellant in his defence merit proper consideration and evaluation. With respect, no amount of linguistic manoeuvring can be advanced to say that the defence of the appellant was not an alibi defence. It was, pure and simple, a defence of an alibi and it is caught under s. 402A of the CPC which states as follows:

A Notice to be given of defence of alibi

402A. (1) Where in any criminal trial the accused seeks to put forward a defence of alibi, evidence in support of it shall not be admitted unless the accused shall have given notice in writing of it to the Public Prosecutor at least ten days before the commencement of the trial.

B

(2) The notice required by subsection (1) shall include particulars of the place where the accused claims to have been at the time of the commission of the offence with which he is charged, together with the names and addresses of any witnesses whom he intends to call for the purpose of establishing his alibi.

C

**[87]** According to s. 402A of the CPC if the accused relies on the defence of alibi, the accused must give notice in writing to the D public prosecutor at least ten (10) days before the start of the trial. The notice must state the place the accused was at the time of the commission of the offence and the names and addresses of any witnesses whom the accused intends to call for the purpose of establishing his alibi.

E

**[88]** In *Rangapula Ramasamy & Anor v. PP* [1981] CLJ 129; [1981] CLJ (Rep) 261, it was held that the non-compliance with the requirements of s. 402A of the CPC will render the evidence in support of alibi inadmissible.

F

**[89]** The Supreme Court in *Hussin Sillit v. PP* [1988] 2 CLJ 9; [1988] 1 CLJ (Rep) 128, held that for the purpose of compliance with s. 402A of the CPC, actual written notice containing particulars of the alibi must be given to the Public Prosecutor within the prescribed period.

G

**[90]** The court in *PP v. Lim Chen Len* [1981] 1 LNS 11, laid down the law explicitly pertaining to s. 402A of the CPC in these salient words:

H

(1) having regard to the clear words in section 402A(1), particularly the words 'shall not be admitted' and 'shall have given notice', evidence in support of a defence of alibi, which previously was admissible, is now no longer admissible in evidence unless the condition precedent as to a pre-trial notice has been complied with. Like section 399(i), the

I

provisions of section 402A(1) are evidential and not merely

> procedural, and unless the defence has given at least ten days written notice before the commencement of the trial, no evidence in support of a defence of alibi can be admitted in evidence. The meaning of 'commencement of the trial' is the commencement of the actual trial itself and not the date when the accused was first charged in court.

**[91]** So, at least ten (10) days before the actual trial the appellant here must give notice of the alibi defence in writing to the Public Prosecutor. This was not strictly complied with by the appellant.

**[92]** The pre-requirement of a pre-trial notice under s. 402A of the CPC is mandatory and the courts in Malaysia have no discretion whatsoever to waive such a mandatory requirement.

**[93]** It is germane, at this juncture, to refer to the Supreme Court case of *Vasan Singh v. PP* [1989] 2 CLJ 402; [1989] 1 CLJ (Rep) 166. There Harun Hashim SCJ interpreted s. 402A of the CPC and lucidly laid down the law pertaining to an alibi defence in these trenchant terms (see pp. 404 to 406 of the report):

> Section 402A was added to the Criminal Procedure Code in 1976. Until then, accused persons were free to put up an alibi defence and to call witnesses in support of the alibi thus creating an element of surprise at the trial. The object of section 402A is aimed at this mischief. It seeks to deprive accused persons of the privilege of keeping back a defence of alibi until the last moment. Clearly the object is to prevent the accused person from keeping back not merely the names of any witnesses he might call in support of the alibi, but also the fact that an alibi is to be raised.
>
> The question is, has the legislature achieved these objectives in section 402A. There is certainly now abundant authority that if witnesses are to be called in support of an alibi defence, then the requirements of a pre-trial notice must be complied with - strictly. What then is the position where the accused himself is the only witness to the alibi. It is obvious, however, that an alibi defence will not be a simple statement of: 'I did not do it. I was not there. I was elsewhere.' That would be evidence of a bare denial. To establish his alibi, the accused must disclose where he was at the time of the alleged offence and what he was doing. He could be travelling at the time and the only evidence he has is a ticket or an endorsement on his passport or, as here, he was in bed. That would be evidence in support of his alibi. The question is whether the words seeks to put forward in section 402A(1) include the case where the accused himself gives evidence.

An accused who gives evidence himself clearly does so because he is seeking to put forward evidence tending to show that he was elsewhere at a particular time. And that evidence is the evidence in support referred to in the sub-section. We are therefore of the view that the words of section 402A(1) given their natural meaning include the case where the accused alone is to testify that he was elsewhere at the material time. Thus - Sub-section (1) standing by itself clearly means that notice must be given in all cases of an alibi defence otherwise the evidence will be excluded. No distinction is made between an alibi defence of the accused alone and an alibi defence supported by witnesses.

Sub-section (2) sets out the particulars required in such a notice which is in two parts:

(a) Particulars of the place where the accused claims to have been at the time of the commission of the offence with which he is charged; and

(b) The names and addresses of any witnesses whom he intends to call for the purpose of establishing his alibi.

If the accused does not intend to call any witnesses, then he need only comply with part (a) of the notice.

The primary purpose of an alibi notice is to alert the prosecution to the fact that an alibi might be relied upon so that they may have the opportunity before the trial of making such investigations as they think fit. It may well be that the alibi is in fact true in which event the prosecution will either withdraw the charge or offer no evidence in the case.

The defence of alibi is a legitimate defence and in fact is often the only evidence of an innocent man. The difficulty, it seems to us, is when and how to exclude an alibi defence for non-compliance with section 402A. First, a distinction should be drawn between a bare denial and an alibi defence. Evidence of bare denial is in any case always admissible. In order to distinguish one from the other, the Court must know the nature of the evidence. As was said in *Ku Lip See v. PP* (supra) at p. 196 -

> If a trial Court having considered the evidence put forward by the defence, holds that such evidence amounts to evidence in support of an alibi for which no notice under section 402A Criminal Procedure Code has been given, then he has no discretion in the matter but to exclude such evidence.

It follows that, initially, the Court cannot prevent an accused person from giving evidence. Having heard the evidence, then the trial Court must decide the nature of the evidence. If it is only evidence of a bare denial, the evidence stays. If it is evidence in support of an alibi and no notice under section 402A has been given, then he must exclude that part of the evidence from his consideration of the defence evidence.

**[94]** The sum total of it all would be this. That since there was no written notice in regard to the alibi defence within the prescribed time as set out in s. 402A of the CPC, the learned JC was right when His Lordship held that (see pp. 36 to 37 of the appeal record at Jilid 1):

(i) the defence did not comply with the provisions of s. 402A of the CPC when the defence failed to give written notice to the prosecution pertaining to the alibi defence;

(ii) the evidence of Uda (SD3) was excluded since it was evidence in support of the appellant's alibi defence;

(iii) the evidence of the appellant pertaining to his meeting with Uda (SD3) at the Kuala Pilah Bazaar Ramadan and whatever connected therewith must be excluded; and

(iv) the evidence of the appellant that he left his Styer pistol (exh. "P23") with the deceased in his GEN-2 motorcar while he went to the Kuala Pilah Bazaar Ramadan and met Uda (SD3) were also excluded because it was linked to the appellant's alibi defence.

**[95]** Applying *Vasan Singh*'s case, the learned JC was right in not preventing the appellant from giving evidence. Having heard the evidence of the appellant, the learned JC "must decide the nature of the evidence". Since the evidence of the appellant hinged on alibi defence where no written notice under s. 402A of the CPC has been given to the public prosecutor, the learned JC was right to exclude that part of the evidence pertaining to the alibi defence from His Lordship's consideration of the appellant's defence.

A **Frame Up**

**[96]** The appellant alleged that it was SP15 who planted a bundle of jewelleries mixed with glass splinters inside the front right pocket of the appellant's trousers when the appellant was B blindfolded at the briefing room of the Kuala Pilah district police headquarters. SD2 confirmed that he saw the appellant was blindfolded but SD2 did not know who had blindfolded the appellant. Under cross-examination, SD2 said that he did not see SP15 nor SP16 in the said room.

C **[97]** The learned JC in a well-written judgment considered the allegation of a frame up at p. 37 of the appeal record at Jilid 1 in this way:

> 49. Walaupun keseluruhan pembelaan berkaitan pembelaan alibi D ditolak, Mahkamah masih boleh menilai isu-isu lain yang berkaitan dengan pembelaan OKT iaitu:
>
> (i) Adakah keterangan OKT, bahawa beliau telah di 'Frame-up' itu boleh dipercayai.
>
> E OKT mengakui bahawa Cif Inspektor Noor Azhar (SP15) dan Inspektor Md Ghani (SP16) tidak mengenali OKT dan Zulkifli. OKT juga mengakui jika SP15 ingin mereka-rekakan keterangannya atau ingin menguatkan pertuduhan SP15 juga boleh memasukkan barang-barang F kemas lain ke dalam poket Zulkifli juga dan tiada siapa yang boleh menghalang SP15 untuk berbuat demikian. Kesemua cadangan serta keterangan OKT mengenai isu framing-up ini telahpun disangkal seawal yang mungkin di peringkat kes pendakwaan melalui keterangan SP15 dan SP16.

G **[98]** Continuing at p. 38 of the appeal record at Jilid 1, the learned JC had this to say:

> 50. Pada pendapat Mahkamah, keterangan SP15 dan SP16 mengenai penemuan rantai-rantai emas P13-P20 dari poket H seluar jeans yang dipakai oleh OKT adalah 'inherently probable'.

**[99]** It must be borne in mind that apart from the bundle of jewelleries which SP15 found in the front right pocket of the I appellant's trousers, glass splinters too were found. Surely SP15 did not put those glass splinters there too. It must be recalled that

SP10 narrated how the shorter male robber had used a hammer and smashed the glass showcase and the robbers then scooped the jewelleries and put them inside the pockets of their jeans. That would have explained the recovery of those jewelleries and the glass splinters inside the appellant's trousers.

**[100]** The assessment of the evidence pertaining to the frame-up made by the learned JC cannot be faulted. At pp. 39 to 40 of the appeal record at Jilid 1, His Lordship had this to say:

> 51. Menurut OKT semasa mata beliau diikat dengan kain tuala beliau boleh melihat tangan SP15 mengambil sesuatu dari baju SP15 kemudian memasukkan tangannya ke dalam poket seluar OKT. Apabila dicadangkan oleh pihak pendakwaan OKT bersetuju bahawa jika SP15 ingin memasukkan sesuatu di dalam poket seluar OKT maka ia tidak perlu menunggu mata OKT diikat dengan kain tuala. Menurut SD2 anggota D-9, seseorang tidak boleh melihat apa-apa jika mata diikat dan tiada sebarang teknik untuk seseorang itu boleh melihat apabila mata diikat. Menurut SD2 lagi semasa melihat mata OKT diikat dengan tuala, beliau tidak nampak SP15 atau SP16 berada bersama OKT. SD2 juga menyangkal cadangan OKT bahawa SD2 yang membuka ikatan kain tuala pada mata OKT. Berdasarkan keterangan-keterangan di atas, Mahkamah tidak dapat mempercayai keterangan OKT bahawa SP15 telah memasukkan barang kemas ke dalam poket seluar OKT.

**[101]** Faced with a situation of this nature, we applied, just like the learned JC did, the case of *Mirza Murtala v. PP* [2010] 4 CLJ 150, a decision of this court. There, Azhar Ma'ah JCA had this to say at pp. 162 to 163 of the report:

> Hence, we are of the view that what was put to the witness SP6 was just a proposition unsupported by evidence and successfully refuted by the prosecution.
>
> (19) The other aspect of the defence story that needs to be addressed is the suggestion by the 1st accused that his arrest together with the 2nd accused and the finding of the incriminating drugs was a frame up. Having been put in a situation where the court was presented with two divergent versions of the episode leading to the arrest of the two accused and recovery of the offending drugs in question, the trial judge had apparently adopted the principle laid down by Thomson CJ in *Public Prosecutor v. Mohamed Ali* [1962] 28 MLJ 257. In that case the learned Chief Justice said:

A When a police witness says something that is not inherently improbable his evidence must be in the first instance be accepted. If his evidence is contradicted by other evidence or is shaken by cross-examination then it becomes the business of the Magistrate to decide whether or not it should be accepted. In the absence of contradiction, however, and in the absence of any element of inherent probability the evidence of any witness, whether police witness or not, who gives evidence on affirmation, should normally be accepted.

C **[102]** The learned JC disbelieved the evidence of the appellant. His Lordship had audio-visual advantage and made specific findings of fact. There are no substantial and compelling reasons for disagreeing with the findings of fact arrived at by the learned JC (*Sheo Swarup and Others v. King Emperor* AIR 1934 227, PC).

D **Other Miscellaneous Issues**

**[103]** There were shortcomings that surfaced in this appeal and they are insignificant and they may be stated as follows:

E (a) there was an unknown male DNA recovered from the dashboard of the GEN-2 motorcar as reflected in the chemist report at p. 116 of the appeal record at Jilid 2 and the police did not take steps to investigate into the origin of this unknown male DNA;

F (b) the outcome of the identification parade was negative;

(c) the swabs taken from the appellant and the deceased were negative; and

G (d) the CCTV was not functioning.

**[104]** But these shortcomings cannot, in our judgment, exculpate the appellant. These shortcomings paled in comparison to the overwhelming circumstantial evidence alluded to earlier which H pointed to the guilt of the appellant. At this juncture, it is ideal to refer to s. 114 of the Evidence Act 1950 which enacts as follows:

Court may presume existence of certain fact

114. The court may presume the existence of any fact which it I thinks likely to have happened, regard being had to the common course of natural events, human conduct, and public and private business, in their relation to the facts of the particular case.

**[105]** And illustration (a) to s. 114 of the Evidence Act 1950 is useful to refer to. It reads as follows:

ILLUSTRATIONS

The court may presume –

(a) that a man who is in possession of stolen goods soon after the theft is either the thief or has received the goods knowing them to be stolen, unless he can account for his possession;

**[106]** The court may presume that the appellant was in possession of the eight (8) gold chains that were found in the front right pocket of the appellant's trousers soon after the robbery and the appellant must account for his possession of those gold chains within the meaning of s. 114 illustration (a) to the Evidence Act 1950.

**[107]** And whether the deceased went by the name of "Zulkifli bin Ali" like what was mentioned by SP1 or by the name of "Zulkifli" as mentioned by the appellant in his defence or by the name of "Zulkipli bin Ali" as mentioned in the police report of SP15, in our judgment, it does not affect the substratum of the prosecution's case in that it was the appellant who committed those two offences as per the two charges based on the solid circumstantial evidence presented by the prosecution.

**Rebuttal Evidence**

**[108]** The appellant had just finished testifying and he has two more witnesses to call. Before those two witnesses were called, the learned Deputy Public Prosecutor elected to call a rebuttal witness in the person of ASP Mustafa Kamal Ghani bin Abdullah (RW(P)). The learned JC permitted the rebuttal witness to be called at that stage.

**[109]** The complaint was that the rebuttal witness was called in the middle of the defence case. On this point, reference should be made to s. 425 of the CPC which enacts as follows:

**Power of Court to summon and examine persons**

425. Any Court may at any stage of any inquiry, trial or other proceeding under this Code summon any person as witness, or examine any person in attendance though not summoned as a witness, or recall and re-examine any person already

A examined, and the Court shall summon and examine or recall and re-examine any such person if his evidence appears to it essential to the just decision of the case.

**[110]** This section gives a wide power to the court at any stage of inquiry, trial or other proceeding to summon, examine, re-examine any person in attendance or those who have given evidence if their evidence is essential to the just decision of the case. In short, the rebuttal evidence can be introduced during the defence case at any time so long as it is essential to the just decision of the case (*PP v. Phon Nam* [1989] 1 CLJ 7; [1989] 1 CLJ (Rep) 142, SC; and *Ramli Kechik v. PP* [1986] 1 CLJ 308; [1986] CLJ (Rep) 243, SC).

## On The Lack Of Proper And Comprehensive Legal Representation

**[111]** It was argued that before the learned JC, the appellant was denied a proper and adequate legal representation. From the appeal records, a defence counsel represented the appellant before the learned JC from the beginning till the completion of the trial. Before us, another defence counsel appeared and he vehemently argued that the defence counsel who defended the appellant before the learned JC failed to take the following courses of action:

(a) failed to issue a proper and valid notice of alibi defence pursuant to s. 402A of the CPC to the public prosecutor and such failure resulted in the learned JC rejecting the appellant's entire alibi defence together with that of the appellant's witness SD3;

(b) failed to issue a proper and valid notice pursuant to s. 399 of the CPC and, consequently, failed to properly cross-examine the forensic and medical evidence tendered by the prosecution; and

(c) failed to object to the admissibility of rebuttal evidence from ASP Mustaffa Kamal Ghani bin Abdullah (RW(P)) when there was no legal basis for the reception of such evidence in the circumstances and at the stage at which it was tendered.

**[112]** Gopal Sri Ram FCJ in *Shamim Reza Abdul Samad v. PP* [2009] 6 CLJ 93, FC writing for the Federal Court accepted "that the right to a fair trial is a constitutionally guaranteed right" (see p. 99 of the report). The background facts of *Shamim Reza*'s case may be stated as follows. The appellant in that case was convicted of the offence of murder of one Zuriyati Othman and was sentenced to death. His defence before the High Court was that some third person had committed the offence. However, that defence was never put to the prosecution witnesses and so the High Court judge had rejected the defence as an afterthought. Before the Court of Appeal and before the Federal Court, the appellant argued that he had not been given a fair hearing by reason of the incompetence of his counsel. The Federal Court dismissed the appeal and affirmed the conviction and sentence.

**[113]** Gopal Sri Ram FCJ sets out the law lucidly in the *Shamim Reza*'s case in these fine words (see p. 99 of the report):

> (4) The question that now arises is whether the right to be represented by competent counsel forms part of the right to a fair trial. The authorities appear to provide an affirmative answer to that question. We do not find it necessary, as a starting point, to traverse beyond the judgment of Lord Woolf in *Sankar v. The State* [1994] UKPC 1, where he put the test as follows:
>
> > In an extreme situation where the defendant is deprived of the necessities of a fair trial then even though it is his own advocate who is responsible for what has happened, an appellate court may have to quash the conviction and will do so if it appears there has been a miscarriage of justice.
>
> (5) What is an 'extreme situation' must depend on the facts of each case. The authorities appear to envisage a case where there has been a flagrant or gross incompetence on the part of counsel as to deprive an accused of a fair trial.

**[114]** In dismissing the appeal and affirming the conviction and sentence on the appellant in the *Shamim Reza*'s case, the facts were highlighted. The evidence revealed that no other person other than the appellant was in the room with the deceased at the material time. The room was locked from within and PW10 had to look for a spare key to open the room. And when PW10

A entered the room, she saw the appellant and the deceased there. The Federal Court held that the possibility of a third person entering the room was too far-fetched.

**[115]** Before us, it was argued that the appellant here was
B deprived of a fair hearing because of the incompetence of counsel at the High Court level. Factually speaking, the circumstantial evidence alluded to earlier in this judgment linked the appellant to the offence of committing armed robbery and discharging a firearm in the course of that robbery. The strong circumstantial evidence
C pointed to the guilt of the appellant. The presence of the appellant at the goldsmith's shop was linked to the bullet slug that was retrieved from the left shoulder of SP10 and that bullet slug came from the Styer pistol (exh. "P23") that was in the possession of the appellant. Even the bullet casing that was recovered at the
D goldsmith's shop came from the same Styer pistol (exh. "P23"). To compound the matter further, the recovery of eight (8) gold chains in the front right pocket of the appellant's trousers mixed with glass splinters sealed the fate of the appellant. The possibility that the appellant was not at the goldsmith's shop must be
E construed as too "far-fetched" (to borrow the words of Gopal Sri Ram FCJ in the *Shamim Reza*'s case). Consequently, the fact that the learned JC held that no alibi notice was given within the prescribed time to the Public Prosecutor and had excluded the evidence connected with alibi defence has not occasioned a
F miscarriage of justice. In our judgment, there was no flagrant incompetence on the part of the defence counsel who conducted the defence before the learned JC.

**[116]** It must be borne in mind that the defence counsel having
G conduct of the case before the learned JC when confronted by the learned JC as to whether any notice of the alibi defence was forwarded to the Public Prosecutor replied that he did not do so for want of time. This response showed that the defence counsel knew the law and he cannot be said to be incompetent or
H "flagrantly incompetent" (to borrow the words of Gopal Sri Ram FCJ in the *Shamim Reza*'s case). The learned JC convicted the appellant not because of the incompetence of the defence counsel but rather because of the overwhelming circumstantial evidence adduced by the prosecution.

I

**[117]** In our judgment, on the facts, it is a gross miscarriage of justice not to convict the appellant for committing both the offences as per the charges (*Yong Kar Mun v. PP* [2011] 1 LNS 1750). We must "be on guard against any tendency of accused persons who have been properly and deservedly convicted to put the result down, not to the crime committed, but to the incompetence of counsel" (per Cooke J in *R v. Pointon* [1985] 1 NZLR 109, 114, CA).

**[118]** We have deliberated at length and we have perused through the two appeal records with a fine tooth comb. We found no appealable errors. It is our judgment that the appellant had failed to raise any reasonable doubt as to his guilt. We are satisfied that the prosecution had proved beyond reasonable doubt the two charges against the appellant. We dismiss the appeal. The convictions and sentences are hereby affirmed.